successfully applied to have service of writ on them set aside. I do not think the question whether the writ is a nullity or an irregularity in that it has not been served within twelve months under Order 8 rule 1 arises in the present case. The question is whether the court would exercise the discretion to renew the writ when the renewal would deprive a defendant of the benefit of a limitation which has accrued. Singleton, L.J. in *Sheldon's* case in his judgment said at page 895: -

"It has been held over a long period of years that this rule (O. 64 r. 7 R.S.C.) enables the court to renew a writ even though application is not made until after the expiration of the twelve months laid down in O. 8, r. 1. The court will not normally exercise its discretion in favour of the renewal of a writ after the period of service has expired if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has accrued."

The principle of course differs from that *Battersby's* case. However, in the light of the passage underlined above, it makes no difference to the present case. As I have said earlier, it is almost on all fours with *Battersby's* case and I refer to the proposition of the Court of Appeal by Lord Goddard at page 391 which has not received any criticism from any court. (See *E. Ltd. v. C. & Anor.*,[5] at page 470): -

"We conclude by saying that even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction (given by O. 64 r. 7) ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as indeed, is laid down in the order. ..... But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development."

Mr. Tan also pointed out that the delay of one and a half years was due to the negotiations with the official administrator, Malaysia, for the purpose of representation as explained earlier. Although he was aware that the time for service of the writ and the limitation period had run out when negotiations were still going on, he had no other alternative. To the suggestion by Miss Tan, he replied that he could not drop the second defendant out as he was the owner of the motor van and employer of the first defendant. Further his correspondence with the official administrator were marked "urgent" in order to impress on the latter the urgency of the matter.

The grounds submitted above, to my mind, are not sufficiently adequate as a good reason. The learned counsel was aware of the limited period during which the writ had to be served and I think it was his duty to bring to the attention of the official administrator the true circumstances of the case. Merely to put the word "urgent" in his correspondence while waiting for the official administrator's consent is, I think, not enough. Further, the application for renewal was made out of time.

In the circumstances, I should therefore exercise my discretion not to renew the writ and enlarge the time as to do otherwise would deprive the defendant of the benefit of a limitation which had accrued well before the application for extension was made.

I therefore set aside my order made in chambers on 6th June, 1971, and make an order in terms of the application with costs.

Application granted.

Solicitors: *Allen & Gledhill; Tan Lye Huat.*

CHONG KUENG YING & ORS. v. LOVIS LAVAGNA

[O.C.J. (Syed Agil Barakbah J.) August 6, 1971]

[Seremban — Civil Suit No. 63 of 1968]

Practice and Procedure — Judgment — Application to set aside — Applicants, aggrieved strangers — Leave to enter appearance — R.S.C. 1957, O. 13 r. 10, O. 27 r. 15 and O. 54 r. 22.

This was an application by way of summons in chambers under O.13 r.10 and O.27 r.15 of the Rules of the Supreme Court, 1957, to set aside the interlocutory judgment in default entered against the defendants on October 1, 1969, and all subsequent proceedings thereafter, and for leave to enter an appearance and to defend the plaintiffs' claim in the action for and in the name of the defendant. The application was subsequently adjourned for argument in open court under O.54 r.22.

The applicants are an insurance company with whom the defendant insured his motor-car. The said motor-car was involved in an accident with another car which resulted in the death of the driver of the other vehicle. On April 4, 1968, the plaintiffs who were the widow and children of the deceased, filed a writ of summons against the defendant which was not served on him for want of his whereabouts. Ultimately, it was discovered that the defendant was in England, and so on December 31, 1968, the plaintiffs applied for the issue of a concurrent writ to be served out of jurisdiction by A.R. registered post, such service to be deemed good and sufficient service. An order was made on January 27, 1969, and the time for entering appearance was substituted for the period of fifty days inclusive of the day of service.

The A.R. card subsequently returned as acknowledged but the defendant did not enter appearance after the lapse of the fixed period. Thereafter interlocutory judgment in default of appearance was made against the defendant for negligence.

Held: Order 27 rule 15 gives a completely unfettered discretion to a court to set aside a judgment in default. The applicants, though strangers to the action, are entitled to an order setting aside the judgment and be given leave to enter appearance in the action in the name of the defendant or in their own name and to deliver a defence on the ground that they are persons aggrieved by the judgment in the action. In the circumstances of this case, there were merits which showed that the applicants had a *prima facie* defence.

Cases referred to:-

(1) *Leong Han* v. *Kupusamy* [1959] M.L.J. 95.

(2) *Re application of Asia Insurance Co. Ltd.; Osman* v. *Tan Swee Liang* [1968] 2 M.L.J. 228 at p. 229.

(3) *Jacques* v. *Harrison* [1883] 12 Q.B.D. 136.

(4) *Windsor* v. *Chalcraft* [1938] 2 All E.R. 751.

(5) *The South British Insurance Co. Ltd.* v. *Haji Ismail; Sin Kek Yeow, Intervener* [1964] M.L.J. 16.

(6) *Johannes Koplan* v. *Aw Chen* [1970] 1 M.L.J. 220, 221.

(7) *Evans* v. *Bartlam* [1937] A.C. 473.

CIVIL SUIT.

K. A. Menon for the applicants/insurers.

T. G. Dunbar (*David Tay* with him) for the plaintiffs.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an application by way of summons-in-chambers under Order 13 rule 10 and Order 27 rule 15 of the Rules of the Supreme Court, 1957, to set aside the interlocutory judgment in default entered against the defendant on 1st October, 1969, and all subsequent proceedings thereafter, and for leave to enter an appearance and to defend the plaintiffs' claim in the action for and in the name of the defendant. The application was subsequently adjourned for argument in open court under Order 54 rule 22.

The applicants are The Motor Union Insurance Company Limited with whom the defendant, the registered owner of motor-car No. PD.7835, insured the said vehicle under a comprehensive policy of insurance without excess. The said motor-car driven by the defendant was involved in an accident with another motor-car No. BC. 3694 along the Seremban/Port Dickson Road, on the 3rd July, 1966, when the insurance policy was still in force. As a result, the driver of the other vehicle was killed. On 4th April, 1968, the plaintiffs who are the widow and the children of the deceased, filed the present writ of summons in the High Court, Seremban, against the defendant whose name should read Louis Lavagna and not Lovis Lavagna as appearing in the title thereto. Three attempts to serve the writ of summons by the court process server failed because the defendant was no longer staying at the address given by him in the police report which was "Century Hotel, Lemon Street, Seremban". Thereafter on 9th April, 1968, the plaintiffs' solicitors wrote to the applicants inquiring whether their solicitors Messrs. K. A. Menon & Co., Kuala Lumpur, had instructions to accept service on behalf of the defendant. On receiving a negative reply and learning that the defendant had left the country, the plaintiffs' solicitors wrote to the defendant's former employer and later received a letter for the United Filters & Engineering Limited, Surrey, England, to the effect that his present address was 60, Helredale Road, Whitby, Yorkshire, England On 6th August, 1968, the plaintiffs' solicitors informed the applicants of the defendant's address at the same time inquiring whether under the circumstances they were prepared to instruct their solicitors in Kuala Lumpur to accept service of the writ on behalf of the defendant. Again they received a reply in the negative. On 31st December, 1968, the plaintiffs filed an application in this court by way of summons-in-chambers for an order that they be at liberty to issue a concurrent writ against the defendant for service out of jurisdiction and to serve a copy of the notice of the said writ together with a copy of the order to be obtained upon the defendant at his present address in England by A.R. registered post; such service to be deemed good and sufficient service. The time for entering appearance by the defendant as stated in the writ was substituted for the period of fifty days inclusive of the day of service. An order was accordingly made on 27th January, 1969. An affidavit of posting was duly made by a clerk in the employment of the plaintiffs' solicitors on 24th February, 1969. The A.R. card was subsequently returned as acknowledged. The defendant however did not enter appearance after the lapse of the period fixed and certificates of result of search were issued on 26th July, 1969, and 16th September, 1969, by the assistant registrar of this court on application of the plaintiffs. Thereafter interlocutory judgment in default of appearance was made against the defendant for negligence. Damages were assessed and the defendant was ordered to pay the sum of $34,970 as general and special damages on 5th November, 1969. Subsequently on 16th July, 1970, the plaintiffs' costs were taxed at $2,576.95 thus bringing the total which the defendant had to pay to the plaintiffs up to $37,541.95.

The applicants are relying entirely on the affidavit of Low Teen Aun dated 28th August, 1970.

I am in agreement with the submission that Order 27 rule 15 gives a completely unfettered discretion to a court to set aside a judgment in default. No time limits of any kind are prescribed. (See *Leong Han* v. *Kupusamy*[1] and *Re application of Asia Insurance Co. Ltd.; Osman* v. *Tan Swee Liang*[2]). I also accept the submission that the applicants though strangers to the action are entitled to an order setting aside the judgment and be given leave to enter appearance in the action in the name of the defendant or in their own name and to deliver a defence on the ground that they are persons aggrieved by the judgment in the action. It was urged by the learned counsel for the plaintiffs that the proper mode of application by a third party who desires to apply to set aside judgment is to show that the applicant has a direct interest in so doing and he must either enter in the name of the defendant with his leave, or he must make both the plaintiff and the defendant parties to the application and ask for leave to intervene. He referred to the *Annual Practice* 1966 (at page 174) Order 13 rule 9, on the authority of *Jacques* v. *Harrison*.[3] That case was discussed in *Windsor* v. *Chalcraft*.[4] The difference between the two is that in the latter the judgment injuriously affects the insurance company since they are liable to pay the amount of that judgment under statutes. The defendant did not appear in the action. "He chose not to appear on the summons. He chose not to ask for any terms to be imposed on the setting aside of the judgment. He must therefore stand the consequences of permitting the insurance company to make application to set aside the judgment and to defend the action, after judgment has been set aside, in the name of the defendant." (*Per* Greer L.J. pp. 753, 754). *Windsor* v. *Chalcraft* has been accepted as authority on the matter. (See *The South British Insurance Co. Ltd.* v. *Haji Ismail; Sin Kek Yeow Intervener*;[5] *Re application of Asia Insurance Co. Ltd.; Osman* v. *Tan*

Swee Liang, supra). The authority is further strengthened by the recent Federal Court decision in *Johannes Koplan* v. *Aw Chen.*[6] The facts are almost on all fours with the instant case. At the hearing of the appeal on the court's suggestion, counsel on both sides readily agreed to an order, by consent, that the interlocutory judgment be set aside and the insurers be allowed to appear and defend the action in the name of the defendant, they paying to the plaintiff all costs thrown away by reason of their default. The principal ground was that there was no possibility of notice having been brought to the defendant's attention. Ong C.J. in his grounds of judgment said at page 221 as follows: —

"In making the suggestion that we did, we might mention that we had in mind practical considerations. Legal technicalities which stand in the way of any aggrieved person seeking and obtaining his remedy in court should not be allowed to prevail so as to frustrate any just claim. Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against their insured. The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interests the action should be defended. If insurers 'have to fight the action without their most essential witness, that would be their misfortune, and not the plaintiff's fault'."

On these authorities it seems to me that in the circumstances of this case there is abundant power to make the order which has been asked for. However, there is another principle to be considered touching the point raised by the learned counsel for the plaintiffs that there was no challenge in the application whether the judgment which had been obtained was regular or irregular.

Evans v. *Bartlam*[7] referring to the exercise of the court's discretion under Order 27 rule 15 lays down the principle that where the judgment is obtained *regularly* there must be an affidavit of merits *i.e.* the applicant must produce to the court evidence that he has a *prima facie* defence.

On the other hand, a judgment *irregularly* obtained will be set aside as of right but the irregularities relied on must be specified in the summons or notice of motion (Order 70 rule 3), the affidavit in support should also state the circumstances under which such default has arisen and the nature of defence should be disclosed. (See *The Annual Practice* 1966. page 173, and *Odgers* on Pleadings and Practice, 17th Edition, page 56).

Now, the affidavit in question especially at paragraph 10 claims that the applicant has a *prima facie* defence and appears to be an affidavit of merits made in accordance with the principle for a judgment regularly obtained. However, paragraph 9 thereof states as follows: -

"(a) I have since been shown a photostat copy of an A.R. registered card which was returned to the plaintiffs' solicitors from England. The signature thereon does not appear to be that of the defendant and I verily believe that there is insufficient evidence to establish that the A.R. registered envelope containing the notice of the writ *etc.* was delivered to the defendant in England.

(b) If the defendant was served with and received the writ in this action either through the post or in any other way in England, he did not at any time inform my principals of this fact."

In raising this issue, obviously made on scrutinising the signature on the A.R. acknowledgment card which appears to be that of "R. Hill", the applicants impliedly allege that the judgment has been irregularly obtained. Merely to rely on this without further evidence is insufficient. The irregularity is not specified in the summons as required under Order 70 rule 3 of the Rules of the Supreme Court. Further, Order 70 rule 2 requires an application to set aside any proceeding for irregularity to be made within a reasonable time. I am not satisfied with the explanations given in the affidavit that they have any reasonable excuse for the delay of nearly two years. The applicants appeared to be waiting for the defendant to get in touch with them even though subsequently they were informed of his address in England by the plaintiffs' solicitors. It is quite true that they did not get instructions from the defendant to enable them to instruct their solicitors in turn to accept service of the writ on behalf of the defendant or to file the defence. However, no attempts have been made by them or their solicitors to get in touch with the defendant even after his address had been brought to their attention. They further said they were not aware of the exact nature of the plaintiffs' claim since no copy of the writ and/or statement of claim were forwarded by the plaintiffs' solicitors to them. They claimed this procedure as customary and made that as an excuse for the delay. No authority was cited to show that such was the duty on the plaintiffs. The only requirement of the law on the point is provided by section 80(2)(a) of the Road Traffic Ordinance, 1958, which requires the plaintiffs to give notice of proceedings to the insurer before or within seven days after the commencement of the proceedings. That was complied with and admitted in the affidavit made on behalf of the applicants in paragraph 6. They could have therefore entered an appearance but did not do so. In the circumstances the judgment cannot be set aside as of right.

The next step is to consider whether the applicants have satisfied the court as to the merits of their affidavit that they have a *prima facie* defence on the basis that the interlocutory judgment has been obtained regularly. It is also said that the court will also require to be satisfied that the defendant has some reasonable excuse for failing to enter appearance. (See *Odgers* on Pleadings and Practice, 17th Edition, page 56).

The grounds are set out in paragraph 10 of the affidavit. Now, the principle regarding the contents of affidavits is that they shall be confined to such facts as the witness is able of his own personal knowledge to prove. However, in interlocutory proceedings if the affidavits contain statements of information or belief, the sources and grounds of the belief must be stated. (See *Odgers* on Pleadings and Practice, 17th Edition, page 257). I find in this case both the sources and grounds of statement of information or belief are dis-

closed in the affidavit *i.e.* the sources in paragraph 10(a), and the grounds in paragraph 10(a) and (b). On careful scrutiny of the relevant affidavit and the annexures attached thereto, I am satisfied that there are merits showing that the applicants have a *prima facie* defence *i.e.* at the very least an inference of contributory negligence on the part of the deceased driver of motor-car BC. 3694 can be drawn, if the issue of negligence or liability for the accident is decided upon by the court in the normal way. In other words, there is some prospect of their being at least partly successful.

On the question of reasonable excuse for the applicants not having entered an appearance, I would quote a passage in *Evans* v. *Bartlam, supra*, in the judgment of Lord Atkin at page 480 which is as follows: -

"It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard in exercising its discretion... The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by failure to follow any of the rules of procedure."

Further, Lord Wright at page 489 says: -

"The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication... The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the court in its discretion is empowered by the rule to impose...

Taking the above into consideration there is good reason to justify my allowing the application to set aside the interlocutory judgment in default entered against the defendant and giving leave to the applicants to enter an appearance and defend the plaintiffs' claim in the action for and in the name of the defendant. I therefore make the order accordingly.

With regard to costs, however, the applicants should bear them by paying to the plaintiffs all costs thrown away by reason of their default.

Application allowed.

Solicitors: *K. A. Menon & Co.; Murphy & Dunbar.*

ABDULMAJID v. HAJI ABDULRAZAK

[O.C.J. (Chang Min Tat J.) August 12, 1971]

[Ipoh — Originating Summons No. 273 of 1971]

Practice and Procedure — Disputes as to facts — Application by way of originating summons — Not suitable medium or process for determination of issues — R.S.C. 1957 O. 55 rr. 4 & 9.

Practice and Procedure — Costs — Plaintiff wanting in frankness — Distortion of facts in affidavit.

In September 1970 the defendant executed a deed in favour of his son the plaintiff and his wife in consideration of his natural love and affection for them. In this case, the orders sought for by the plaintiff/grantee against his father, the grantor, were for carrying out the trust as in the deed, by the court for all necessary vesting and other orders in respect of the trust property and for all proper consequential directions, accounts and enquires. The plaintiff applied for these orders by way of originating summons under R. S. C. O.55 r.4, to which application the grantor applied to set aside the proceedings on a objection taken to the use of an originating summons. In his affidavit in support, he denied that there was a valid trust as he produced evidence indicating a subsequent change of heart. He contended that in view of the disputes arising as to the facts, the action should have been commenced by writ.

Held: (1) questions of jurisdiction apart, courts would refuse to decide questions of fact on an originating summons as a matter of some inconvenience;

(2) in the circumstances of this case, the grantor's subsequent change of heart may have led to another consensual variation. If so, then it remained for the court to find what was the actual agreement reached. If it did not, then the question remained whether the grantor had so bound himself contractually that he must be made to perform specifically any contract entered into validly by him and as varied consensually. This meant, at the least, that evidence would have to be led, and therefore an originating summons was not a suitable medium or process for the determination of the issues raised;

(3) in this case as the plaintiff was wanting in frankness and his last affidavit was a distortion of facts, he should bear the costs of the proceedings.

Cases referred to:-

(1) *Re Yeap Chor Ee* [1954] M.L.J. 248.
(2) *Ponniah* v. *Chinniah* [1961] M.L.J. 66.
(3) *Foon Seong* v. *Chan San Choon* [1947] M.L.J. 85.
(4) *Ong Yok Chu & Anor.* v. *Yong Teck Fong & Anor.* [1960] M.L.J. 292.
(5) *In re Giles* [1890] 43 Ch. D. 391.

ORIGINATING SUMMONS.

M. Sivalingam for the applicant/defendant.

N.T. Rajah for the respondent/plaintiff.

Cur. Adv. Vult.

Chang Min Tat J.: An objection is taken to this application by a *cestui que trust* under an executed deed of trust against the grantee for an order to administer the trust, by way of an originating summons under 0.55 r.4 of the Rules of the Supreme Court. It is contended by the grantor that in view of the serious disputes as to facts, the action should have been commenced by writ.

It might be convenient to commence by considering the authorities on the applicability of an originating summons. An application made under 0.55 r.4 by an originating summons is, *inter alia*, for administration of a trust. This must presuppose the